IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.481 OF 1987

1. Annappa Dadu Chanvire
(rejected vide Additional Registrar's
Order dated 15-10-2003)
2. Shankar Dadu Chanvire
3. Ganpati Dadu Chanvire ...Appellants

Versus

1. Gangaram Sadgonda Patil
2. Bhausaheb Mallappa Chanvire
3. Kallappa Mallappa Chanvire
4. Balasaheb Mallappa Chanvire
5. Mahadeo Mallappa Chanvire
6. Smt.Laxmibai w/o Dhulgonda Patil
7. Shivgonda Satgonda Patil ...Respondents

Shri A.A.Kumbhakoni for Appellants

Smt. S.S.Gokhale for Respondent No.1

CORAM: A.S.OKA, J.

DATED: JULY 21, 2004.

ORAL JUDGMENT :

1. On October 30, 1987 this Court admitted the Second Appeal by observing that plea regarding Res-judicata and applicability of Order II Rule 2 are the substantial questions of law.

2. I have accordingly heard the Counsel appearing for the parties on the said substantial questions of

law. The Appellants are the Plaintiffs and the Respondents are the Defendants. The suit is for possession of area of 2 acres and 33 gunthas (hereinafter referred to as the suit land) out of Survey No.165 totally admeasuring 5 Acres and 26 Gunthas at village Takawade in taluka Shirol, District Solapur. The case of the Appellants - Plaintiffs is that they were in possession of the suit land and they have been dispossessed. The suit was resisted by the Respondent Nos.2 to 6. A contention is raised that one Bhau Lagamgonda Patil was the original owner and possessor of the said survey No.165. One half portion of Survey No.165 was in possession of the father of the Appellants and the remaining one half portion was in possession of the father of the Respondent Nos.2 to 6 as mortgagees. The said Bhau filed a suit under B.A.D.R. Act. In the suit filed under B.A.D.R. Act, instalments of mortgage amount were granted which were not paid by the said Bhau or his wife. Therefore, a Darkhast was filed in which the property was put to auction. It is contended that the Respondent No.1-Defendant No.1 purchased the property in court auction. The Respondent Nos.2 to 6 contended that one half share which was with their father was sold to the Respondent No.1. A contention was raised by the Respondent No.1 in his written statement that the

suit was hit by principles of Res-judicata as provisions of Order II Rule 2 of Code of Civil Procedure. The predecessor of Appellant has filed Regular Civil Suit No.105 of 1965 inter alia for declaration that he was the owner of land admeasuring 2 acres and 33 gunthas which was put in possession of the Respondent No.1 in auction. The said suit was dismissed and an Appeal was preferred against the Respondents was also dismissed. The Respondent No.1 submitted that a false suit has been filed by the Appellants in collusion with the Respondent Nos.2 to 6.

3. The Trial Court decreed the suit filed by the Appellants holding that the Appellants have established that the Respondent No.7 practised a fraud upon the Court, Revenue Officer and the Appellant in B.A.D.R. in Darkhast No.1 of 1961. The Trial Court, however, rejected the contention raised by the Respondent Nos.2 to 6 that the Original owner Bhau mortgaged the one half portion of the suit land in favour of the father of the Appellants and remaining one half portion to the father of the Respondent Nos.2 to 6. The Trial Court held that the suit was not barred by Res-judicata and provisions of Order II Rule 2 of Code of Civil Procedure,1908.

4. There were two Appeals filed in the District Court by the Respondent Nos.1 & 7. By a common Judgment and Decree dated 5th December 1986 the said Appeals were allowed by the learned Additional District Judge,Kolhapur. Being aggrieved by the Judgment and Decree of the Appellate Court the original Plaintiffs-Appellants have preferred this Second Appeal.

5. The learned Counsel appearing for the Appellants submitted in the present suit the possession is prayed for only on the basis of the prior possession of the Appellants. He submitted that during the pendency of the earlier Civil Suit No.105 of 1966 the Appellants were dispossessed and as a matter of fact in the said suit the Trial Court has recorded a clear finding that on the date of institution of the suit the Appellants were in possession. He, therefore, submitted that there is no question of attracting bar under the provisions of Order II Rule 2 as when the earlier suit was filed, the Appellants were in possession and therefore, there was no question of incorporating the prayer for possession in the earlier suit. He submitted that the suit was not barred by the principles of res-judicata as the Appellants were entitled to be placed back in possession on the basis of their prior possession.

The learned Counsel for the Appellants submitted that the controversy involved in the earlier suit was totally different. He submitted that the suit land was not subject matter of the proceedings under B.A.D.R. Act and by playing fraud upon the Revenue Authority the description of the suit land was mentioned in the 'Kabjepavti' in favour of the purchaser in execution proceeding. The learned Counsel for the Respondent No.1 has supported the findings of the Appellate Court.

6. I have perused the Judgment of the Civil Court in earlier Civil Suit No.105 of 1966 as well as the description of the suit property in the said suit. It cannot be disputed that the subject matter of both the suits was the same. In the earlier suit the Trial Court held that the father of the Appellants failed to establish that he has a valid title to the suit property on the basis of sale deed dated 6th April 1953. The Trial Court also held that the Respondent No.1 herein has proved that the sale deed dated 6th April 1953 was invalid in view of the provisions of Section 40 of B.A.D.R.Act. The Trial Court specifically held that the Respondent No.1 herein has proved that he got a good title to the suit property by virtue of the order in B.A.D.R. Darkhast No.1 of 1961. In the said suit there is a

clear finding that the sale deed on the basis of which father of the Appellants claimed title was invalid. The Trial Court also held that the Award-Decree passed in B.A.D.R. Case No.4349 of 1951 was binding on the Plaintiff in the said suit. The further findings recorded that the possession of the suit property was given to the Respondent No.1 under 'Kabjepavti' executed in execution proceeding i.e. in B.A.D.R. Darkhast No.1 of 1951. A specific contention was raised in the said suit by the father of the Plaintiff that the decree holder who had filed the Darkhast No.1 of 1961 had not prayed for sale of the suit property and the Court had not ordered sale relating to the suit land and therefore, the possession purportedly given under 'Kabjepavti' is not of the suit land A specific contention of the father of the Appellants that the property of Akkubai was described in the 'Kabjepavti' was dealt with by the Trial Court in the said suit.

7. In view of the findings which were recorded in the said suit and confirmation thereof by the District Court, the controversy in this Appeal will have to be appreciated. As contended by the learned Counsel for the Appellants the present suit was filed by invoking Article 64 of the Limitation Act, 1963. If concluded findings in earlier suit are considered,

it is very clear that in earlier suit it was held that the sale of the suit land in favour of the Respondent No.1 was lawful. In the earlier suit it was also held that the Appellants have failed to establish their title on the basis of the sale Deed dated 6th April 1953. If this is the position, the Appellants cannot seek the decree for possession as against the true owner on the basis of alleged prior possession. As issue regarding title was concluded between the parties in the earlier suit, the Appellate Court came to the conclusion that the present suit was barred by principles of Res-judicata. The Appellate Court has also held that the Appellants are not entitled to relief of possession as against the true owner. If the Appellants were dispossessed lawfully during the pendency of earlier suit, the Appellants cannot file a fresh suit and claim possession against the lawful owner. It is, therefore, difficult to find fault with the reasons given by the Appellate Court. However, it must be noted that the Appellate Court could not have recorded a finding that the suit was barred by provisions of Order II Rule 2 of Code of Civil Procedure as in the earlier suit the finding is recorded that the father of the Appellant was in possession on the date of institution of the suit.

8. Hence, there is no merit in the Second Appeal.

Same is dismissed with no order as to costs.

Judge.